United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7161

To be argued by
FRANCIS F. CAPUTO

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT GRANT,

Plaintiff-Appellee,

-against-

BOARD OF EDUCATION OF THE CITY OF NEW YORK AND FRANK C. ARRICALE II, EXECUTIVE DIRECTOR, DIVISION OF PERSONNEL,

Defendants-Appellants,

IRVING ANKER, CHANCELLOR,

Defendant.

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York

APPELLANTS' BRIEF

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Appellants,
Municipal Building,
New York, N.Y. 10007
566-4327 or 566-4337

UNITED STATES COURT OF APPEALS
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L. KEVIN SHERIDAN,
FRANCIS F. CAPUTO,
of Counsel.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROBERT GRANT,

Plaintiff-Appellee,

-against-

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Defendants-Appellants,

IRVING ANKER, CHANCELLOR,

Defendant.

On Appeal from an Order and Judgment of the United States District Court for the Southern District of New York

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APPELLANTS' BRIEF

Preliminary Statement

In this pro se action brought pursuant to 42 U.S.C. §§ 1983 and 1985 (3), the appeal by the defendants Board of Education and Frank C. Arricale II is taken from so much of an order and final judgment of the United States District Court for the Southern District of New York (PIERCE, J.), entered March 7, 1977 which, as amended, awarded plaintiff, formerly a high school teacher employed by the Board, the sum of $35,698.24 plus interest as damages for violation of his constitutional rights. The District Court had earlier

directed summary judgment in favor of the plaintiff on the issue of liability.

Questions Presented

1. (a) Was plaintiff deprived of procedural rights created under state law and the collective bargaining agreement when he was placed on medical leave without pay?

(b) Assuming, arguendo, that plaintiff was deprived of these statutory and contract rights, would such deprivation in and of itself amount to a deprivation of due process of law?

2. Did the temporary suspension of plaintiff without pay on medical grounds without a hearing deprive plaintiff of a property or liberty interest without due process of law?

3. Did the District Court have the power to create a cause of action based directly upon the Fourteenth Amendment, and, assuming it did possess such power, should it have been exercised to create a cause of action for money damages against the defendant Board of Education, which has been held immune from suit under 42 U.S.C. § 1983?

4. On this record and upon a motion for summary judgment, did the District Court err in holding the defendant Arricale liable for money damages under 42 U.S.C. § 1983?

Facts

(1)

Plaintiff, then a tenured high school teacher employed by the appellant Board of Education (the "Board"), commenced this pro se action pursuant to 42 U.S.C. §§ 1983 and 1985 (3) claiming that he was denied due process of law by the manner in which he was placed on involuntary medical leave of absence.*

In January, 1974, Grant was given an unsatisfactory rating by the principal of his high school and was removed from teaching duties and transferred to Board of Education headquarters where he worked as a clerk for the balance of the school year. During the fall of 1974, while still assigned clerical duties at the Board's headquarters, he was absent from work on 14 occasions during the months of October and November (5, 43).** On December 6, 1974, Grant was sent a notice from the Medical Division of the Board requesting him to appear for a medical examination "in connection with absence" (5, 17).

Plaintiff alleged that he was informed by the Board through legal counsel he had retained that the purpose of the examination was to aid in processing his

*Plaintiff was briefly reinstated to his position with the Board as a result of this litigation, but was subsequently dismissed from service based on findings made in an unrelated disciplinary proceeding.

**Numbers in parentheses refer to pages in the Joint Appendix.

claims for sick leave so that he could be paid for his recent absences (5-6).

The Board alleged that the purpose of this examination was "to determine the degree of disability resulting from his [Grant's] illness on these dates" (43, para. 6; 50).

Grant appeared for the scheduled physical examination on December 9, 1974 (44). On December 16, Grant received checks from the Board for the days of absence in question (6). The Board acknowledged that the examination revealed his absences from work were for valid medical reasons (44).*

The doctor who examined Grant on December 9 found him to be "agitated but controlled", "lacking in insight", "hostile" and "verbose". He suggested that Grant was in a "distressed state" and recommended that he be seen by a consulting psychiatrist (52-53). As a result of this examination, the Medical Division reported to the Office of Personnel that Grant was "obviously unfit for duty" (54).

As a result of this examination, the Medical Division found Grant not fit to immediately return to work. The Office of Personnel accepted the Medical Division's recommendation and notified Grant in a letter

*In his application for sick leave credit, Grant had claimed that his absences had been caused by "[s]evere recurring headaches" (50).

signed by defendant Arricale dated December 20, 1974. The letter stated that the Medical Director had recommended in a report that Grant be placed on health leave at least until February 1, 1975 and possibly to June 30, 1975 and that he be re-examined prior to his return to duty (55). Grant was not sent a copy of the report referred to in the letter (26-27).

At the same time Grant received a second notice requesting him to appear for a physical examination on January 6, 1975 "in connection with your fitness to return to duty" (18). The Board acknowledged that this second notice was probably the result of administrative error, but, in any event, Grant did not appear for the scheduled examination (45).

When Grant returned to work on January 2, 1975, following the Christmas recess, he was informed that he was listed as having been on medical leave since December 20, 1974. When Grant complained that he had never received notification that the recommendation referred to in Arricale's first letter had been accepted, a Board employee gave Grant a second letter, also dated December 20, 1974. This letter was identical to the previous letter, except that it added the statement that Grant was in fact placed on leave of absence effective immediately (56). The Board admitted that this second letter was prepared on January 2, 1975 at plaintiff's request in order to clarify that he was on health leave (27, 45).

Grant received a third request, dated January 17, 1975, to appear for a medical examination. Plaintiff appeared and was examined by two staff physicians, both of whom recommended that plaintiff be referred to a consulting psychiatrist (46, 58, 60). Their handwritten reports noted that Grant remained highly volatile when questioned about his headaches and anxieties "so that he loses control of his rage". He was described as continuing to be extremely hostile and threatening (59). His condition was diagnosed as "agitated state [with] paranoid features" (58).

At the request of the Board, Grant submitted a report from his private physician which stated that he was in good health (8, 21). At the January 27 medical examination Grant was also asked to have his physician supply a report "concerning the diagnosis, prognosis and treatment in your case" (8, 22).

On February 3, 1975, Arricale stated in a letter to one Michael Rebell (apparently counsel retained by plaintiff) that Grant had been placed on health leave to February 1, 1975, that he was subject to further examination to determine his fitness to return to duty, that additional medical analysis was underway, and that Grant was to remain on health leave on the basis of the medical findings to date (23). On or about the same date, Grant received a letter from the Medical Division of the Board requesting that

he report for a psychiatric examination on February 13, 1975. Grant failed to appear for this examination but instead instituted the instant action on April 7, 1975.

(2)

In his complaint, Grant charged that in placing him on medical leave in the manner in which they did the defendants deprived him of rights under the New York State Education Law § 2568 and under Article IV, F, 4 of the union contract governing his employment. Grant contended that the true purpose of the December 6, 1974 notice and the physical examination which occurred on December 9, 1974, was not to examine him with regard to his earlier absences, but rather to make a determination concerning his fitness to teach. Grant claimed that the defendants concealed the true purpose of the medical examination in order to circumvent procedures mandated by Section 2568 of the Education Law (12). That statute provides that a person employed by the Board may be required to appear for a medical examination to determine his capacity to perform his duties whenever such procedure is recommended in a written report by the employee's supervisor. The statute also gives the employee the right to be accompanied by a physician or other person of his own choice at the examination. Grant also claimed that he was entitled to a copy of the supervisor's

report recommending a medical examination under Article IV, F, 4 of the union contract then in effect (11). Finally, Grant claimed that he was denied the right to be examined by an independent committee of physicians under the same provision of the union contract (14).

The defendants alleged that the cited provisions of Section 2568 did not apply to the situation before the Court because the medical examination had been initiated at plaintiff's request in order to determine if he was qualified to receive sick leave credit for past absences. The examination had not been initiated by a report from plaintiff's supervisor, so provisions of the union contract relating to disclosure of that report were inapplicable. Defendants asserted that plaintiff did have a right to review a finding of medical disability before an "ad hoc committee" of three doctors, but contended that no final determination of medical disability had been made and that therefore the action was premature (65-67). Defendants also alleged that they had at all times acted in good faith in accordance with all applicable law and had not conspired to deprive plaintiff of any right (30-31, 68).

Defendants moved for summary judgment upon the ground that plaintiff had failed to exhaust his available administrative remedies or, in the alternative, for summary judgment on the merits (41).

Defendants argued that if plaintiff had submitted to a psychiatric examination and thereafter a final determination had been made that he was medically unfit to teach, plaintiff could have invoked his rights under Article IV, F(2I) of the union contract. That section provides review of a medical determination by an ad hoc committee of three physicians, composed of a representative of the Board's medical staff, a physician chosen by the employee, and a third physician chosen by the other two. After separately examining the employee, the findings of the three doctors are submitted to the Chancellor in writing as an advisory opinion (69).

After this stage, the employee would next appear before the Chancellor's Committee on Disabled Teachers pursuant to Section 105(a)(2) of the By-Laws of the Board. This section provides a hearing before three impartial and experienced educators who have no prior knowledge of the facts. The employee has the right to be accompanied by a representative, though not an attorney, to submit medical reports and other relevant evidence. The proceedings are recorded.

Plaintiff also moved for summary judgment (34).

Opinion Below

The Court rejected defendants' argument based on failure to exhaust administrative remedies. The Court stated that the "essence of Grant's complaint is not that

he was improperly determined to be unfit to teach", but rather that he was denied rights under statute and contract that he would have exercised had he known that the issue of his fitness would be raised. The Court found that the administrative review provided by defendants was not geared to review this issue, and, in any event, was insufficient, because it was informal in nature, did not provide for representation by counsel, and could not have resulted in an award of money damages (84-85).

The Court found that there had been no final determination made as to Grant's fitness, so it denied the claim as premature that he was deprived of the ad hoc committee review provided for in the union contract (95, n. 7).

The Court found that the intended purpose of the initial medical exam on December 1, 1974 was to determine if Grant's past absences were for valid medical reasons and was held at Grant's own request (87). The Court held, however, that since the results of the examination were in fact used to determine his medical fitness, Grant should have received the procedural rights afforded by the statute and contract. The Court added that the denial of these rights by defendants had been unintentional (88). The Court found that the denial of the statutory and contract procedures constituted a denial of procedural due process (88).

The Court dismissed the claim under 42 U.S.C. § 1985 (3) and dismissed the defendant Anker from the action, finding no allegation of his personal involvement (89-90).*

The Court found that plaintiff would have been entitled to the sum of $35,698.24 as salary for the period December 20, 1974 to October 1, 1976, the date of his reinstatement, and awarded plaintiff this sum as damages. The damages award against Arricale was based upon 42 U.S.C. § 1983. The award against the Board was said to be based upon 28 U.S.C. § 1331 and the 14th Amendment (103-105).

*The Court erroneously entered a "partial judgment" dated August 31, 1976 finding Anker and Arricale liable and dismissing the Board of Education (96). In its "Memorandum and Order" dated February 2, 1977, the Court treated all three defendants as still in the action (102, 105) and subsequently entered an "Order and Final Judgment" dated March 2, 1977 against all three defendants (109). The Court on its own motion entered an "Order and Amended Judgment" dated March 11, 1977 that corrected the final judgment by dismissing Anker from the action (110). The Court also corrected its previous orders and memorandum to reflect Anker's dismissal and the finding of liability against the Board (98, 106, 107).

RELEVANT STATUTE, BY-LAWS AND PROVISIONS OF THE UNION CONTRACT

N.Y. Education Law, § 2568

"Superintendent of schools authorized to require medical examination of certain employees of certain boards of education

The superintendent of schools of a city having a population of one million or more shall be empowered to require any person employed by the board of education of such city to submit to a medical examination by a physician or school medical inspector of the board, in order to determine the mental or physical capacity of such person to perform his duties, whenever it has been recommended in a report in writing that such examination should be made. Such report to the superintendent may be made only by a person under whose supervision or direction the person recommended for such medical examination is employed. The person required to submit to such medical examination shall be entitled to be accompanied by a physician or other person of his own choice. The findings upon such examination shall be reported to the superintendent of schools and may be referred to and considered for the evaluation of service of the person examined or for disability retirement."

Article IV, F, (21) of the Union Contract:

"21. Medical Report and Review

The report of the medical division on a teacher who was called for medical examination shall, upon written request of the teacher, be sent to the teacher's physician.

A regular teacher shall have the right to an independent evaluation by an ad hoc committee of physicians if the finding of the medical division to the Chancellor has resulted in: (1) placement of the teacher on a leave of absence without pay for more than three months, or (2) termination of the teacher's services, or (3) a recommendation for disability retirement.

A request for an independent evaluation of the finding of the medical division shall be submitted in writing by the teacher to the Office of Personnel within five school days of receipt of notice from the Office of Personnel that he has been placed on leave of absence or that his services have been terminated, or that he has been recommended for disability retirement.

The ad hoc committee shall consist of one physician selected by the teacher, one physician selected by the Board of Education, and a third physician selected by the other two physicians.

The findings of the ad hoc committee shall be reduced to writing and submitted to the Chancellor as an advisory opinion.

The fee of the third physician will be shared equally by the teacher and the Board of Education.

Failure by the teacher to select a physician within 30 days of the receipt of notice from the medical division to do so, shall be deemed a withdrawal of the teacher's request for independent evaluation."

Article IV, F, (4) of the Union Contract:

"The report of the immediate supervisor requesting examination of a teacher pursuant to Education Law, Section 2568 shall be made in duplicate. A copy of the report shall be furnished to the teacher."

By-Law 105 (a) (2):

"2. Any person in the employ of the Board of Education who is summoned to appear before the Superintendent of Schools, any person or a committee designated by him, for the determination of such person's ability to render continuous and efficient service as based on medical reports, shall receive written notice of the time and place of the meeting, mailed to the person so summoned, addressed either to the school or to

his last-known post office address, specifying the matter to be considered, at least one week before the date specified for the said meeting. The notice shall inform the said person that he is to appear in person, and, if he so elects, may be accompanied and advised by an employee of the Board of Education, and introduce any relevant evidence. The attendance of such adviser shall not be deemed absence from official duty, but such persons shall not absent themselves from school duty, except pursuant to such rules as the Superintendent of Schools shall prescribe. No person shall serve as an adviser in more than two matters in a school year within the provisions of this Section. No person in the employ of the Board of Education shall request or accept directly or indirectly any remuneration or other consideration for service as adviser."

By-Law 106-7a, in part:

"7a. A member of the teaching and supervising staff who has exhausted the number of days accumulated to his credit for excuse of absence with pay, owing to personal illness, and who, in the opinion of the Medical Bureau of the Board of Education, will not be able to return to full service within one calendar month from the date the reserve is exhausted, shall be declared by the Superintendent of Schools in the status of an inactive employee without pay."

* * *

Point I

NEW YORK STATE EDUCATION LAW SECTION 2568 DID NOT APPLY TO THE FACTS OF THIS CASE. EVEN IF THE STATUTE DID APPLY, ANY PROCEDURAL RIGHT GUARANTEED BY IT OR BY THE UNION CONTRACT WAS WAIVED BY PLAINTIFF.

ASSUMING THAT PROCEDURAL RIGHTS CREATED BY STATE STATUTE AND CONTRACT WERE DENIED PLAINTIFF, THAT DENIAL EO IPSO WOULD NOT CONSTITUTE A DENIAL OF PROCEDURAL DUE PROCESS.

(1)

The District Court's conclusion that defendants violated Education Law §2568 was erroneous. The Court found that the initial medical examination had been scheduled at plaintiff's own request in order to qualify him for sick leave credit. Once the examination was held, the medical division discovered that Grant had a potentially serious medical disorder. At that point, it would have been absurd to have required Grant's supervisor to make a written request for a medical examination. Requiring a written referral from a supervisor when a medical examination is requested certainly protects an employee from harassment by his supervisor, but, it is irrelevant when the medical condition has previously been discovered by a physician.

The Court also found that Grant was denied the right to be accompanied by a representative at the medical examination. It is submitted that no such right was denied by the Board. Grant never requested

to be accompanied by anyone, nor did he request a copy of a supervisor's report. Furthermore, neither he nor the Board was aware of the diagnosis that would result from the first medical examination.

Grant does not allege that he ever requested his rights under §2568 or the union contract before attending either medical examination. To the extent that the Court feels these rights were applicable under the facts of this case, we submit that they were waived by plaintiff, a teacher with 14 years experience. There was no requirement in statute or contract that the Board affirmatively notify plaintiff of these rights when a medical examination was scheduled. Certainly there is no claim that defendants or their agents told Grant that he could not be accompanied by a representative to either medical examination. We would also note that plaintiff was represented by counsel during this period.

(2)

The District Court also erred in concluding that a denial of procedural rights granted by a state statute and union contract constitutes, in and of itself, a violation of federally protected due process rights. A denial of procedural rights created by state statute and contract gives rise to a cause of action under state law. However, only when the resulting procedure itself impinges upon due process does a federal question become involved. See, e.g., Winnick

v. Manning, 460 F. 2d 545, 550 (2d Cir., 1972); Bates v. Sponberg., 54/ F. 2d 352 (6th Cir., 1976). Cf. Vitarelli v. Seaton, 359 U.S. 535, 540 (1959). Here, there can be no suggestion that plaintiff had an independent federally protected right to a new medical examination initiated by a written report of a layperson, nor did he have an independent federal right to be accompanied by his representative to an otherwise validly scheduled medical examination.

POINT II

THE TEMPORARY SUSPENSION OF PLAINTIFF WITHOUT PAY PENDING FURTHER MEDICAL EVALUATION DID NOT AMOUNT TO A DEPRIVATION OF A PROPERTY OR LIBERTY INTEREST WITHOUT DUE PROCESS OF LAW.

Although not reached by the District Court in its opinions, this Court may find that the complaint implicitly raised the broader question whether the procedures employed by the Board of Education in placing plaintiff on temporary inactive medical leave violate constitutional guarantees of due process (13, para. 42). The constitutional issue before the District Court was, in our view, whether the Board had to afford plaintiff a full-blown adversarial hearing before accepting the recommendation of its physicians that plaintiff be placed on temporary health leave without pay.

The United States Supreme Court has recognized a very limited range of interests the deprivation of which entitle the holder to procedural due process protection. This protection has been held to apply only to the "deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property". Board of Regents v. Roth, 408 U.S. 564, 569 (1972). In the context of this case, a "liberty" interest would be implicated if plaintiff's "good name, reputation, honor or integrity" were at stake (Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) or if he was being stigmatized. Roth, supra. 408 U.S. at 573.

An individual is deprived of liberty by stigmatization when, in the context of termination of employment, derogatory statements about him are publicly disclosed. Compare, Bishop v. Wood, 426 U.S. 341, 348 (1976), with Paul v. Davis, 424 U.S. 643 (1976). Here, all of the information and reports were disclosed only to Board officials. This very limited disclosure distinguishes this case from Lombard v. Board of Education, 502 F. 2d 631, 637-638 (2d Cir., 1974), where there was a wide-ranging disclosure of allegedly stigmatizing reports. Without this disclosure plaintiff has suffered no constitutional loss of liberty. Any statement to the contrary in Snead v. Dep't of Social Services, 389 F. Supp 935 (S.D.N.Y., 1974) remanded, 421 U.S. 982 (1975), on remand, 409 F. Supp. 995 (S.D.N.Y. 1975), and Lombard v. Board of Education, supra. we submit, is no longer good law.

Even assuming that the information was disclosed, a Roth hearing would be mandated only if the stigmatized individual denied the allegations.* Codd v. Velger, __ U.S. ___, 97 S. Ct. 882, 884 (1977). Nowhere in the complaint does plaintiff contend that the allegedly stigmatizing reports are untrue. Plaintiff's appearance pro se is no excuse for his failure to allege the foundation of this

*This hearing could be held after plaintiff was suspended or dismissed. "Since the purpose of the hearing ... is to provide the person" an opportunity to clear his name," a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause" Arnett v. Kennedy, 416 U.S. 134, 157 (Opinion of Rehnquist, J.).

argument - falsity. As the Supreme Court stated in Velger, supra, the dismissal of a deprivation of liberty complaint for failure to allege falsity "rests upon no overly technical application of the rules of pleading." "97 S. Ct. at 884. Therefore, plaintiff's failure to allege falsity raises no issue of fact as to deprivation of liberty.

The second question that could be raised under the Supreme Court's analysis of public employee rights is whether plaintiff has been deprived of a property interest without appropriate procedural protection. This question, in turn, falls into two parts - one, whether plaintiff's property interest is broad enough to cover the facts of this case and, two, whether under the facts of this case, any interest plaintiff had was unconstitutionally taken from him.

A public employee has a total property interest in his position if he has tenure and an unconditional right to continued employment. Roth, supra, 408 U.S. at 577; Bishop v. Wood, 426 U.S. 341, (1976).

In Bishop v. Wood, supra the Court held that a public employee whose position is conditioned on his fitness to serve does not hold an unconditional property interest in his position. 426 U.S. at 345. Arnett v. Kennedy, 416 U.S. 134 (1974), was distinguished on the grounds that in Arnett the Court initially found the requisites for an unconditional property interest. Bishop v. Wood, supra, 426 U.S. at 345 fn. 8.

Plaintiff's employment here was subject to Section 106-7(a) of the Board of Education's By-Laws which specifically conditioned his continued active service on his fitness for duty. However, unlike the situation in Bishop v. Wood, the sanction for such unfitness was a temporary suspension rather than immediate outright dismissal. Based on this provision, plaintiff possessed only a partial property interest in his position which interest, we concede, would be affected were an attempt made to dismiss him. In neither Arnett, Wood nor Roth, did the Court indicate a willingness to obligate the state to grant all of the traditional incidences of property rights to partial property interests. Cf. Gotkin v. Miller, 514 F. 2d 125, 129 n. 6 (2d Cir., 1975). Accordingly, this Court should not extend the due process protection to cover plaintiff's conditional interest.

Plaintiff's interest in the limited property right he does have in his position is protected only from an unconstitutional taking or an infringement amounting to a taking. Generally, this taking occurs when the employee is dismissed rather than temporarily suspended. The argument that plaintiff has had an interest taken from him is further belied by the rights plaintiff retains while on inactive status. Plaintiff has only been temporarily deprived of his interest in salary payments.* He has suffered no

*This right has been found by the highest court of this state not to rise to constitutional proportions. Matter of Jerry v. Board of Education, 35 NY 2d 534, 541 (1974). Cf. Sampson v. Murray, 415 U.S. 61, 90 (1974).

break in service for seniority and pension purposes. Plaintiff may receive up to one year's service credit counting toward his total years of service for pension purposes, for time spent on leave of absence without pay. Plaintiff would retain his full free medical insurance including expanded benefits and dental insurance for one year while on health leave. Plaintiff would also receive a payment of $100 per week, beginning one month after the start of the leave, for up to 28 weeks while on health leave. This payment is made from the Union Welfare Fund, which, in turn, is funded substantially by payments from the Board. Plaintiff has not been dismissed from his position. Furthermore, the actions taken have no affect on what is probably his most valuable asset, his license to teach. Cf. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Therefore, while we do not minimize the gravity of a loss of salary payments, the temporary suspension of this interest in light of the benefits retained by plaintiff, we contend does not amount to a constitutionally prohibited deprivation.

Should the court determine that plaintiff was deprived of a property interest the question posed is what amount of process is then due. Morrissey v. Brewer, 408 U.S. 471 (1972). The requirements of due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960).

The determination of what procedures are constitutionally mandated must include a balancing of the precise nature of the governmental function against the private interest that has been affected by the governmental action. Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

The governmental interests expressed in the procedures relating to medical leave deal primarily with the safety of public school children and Board employees and the efficient performance of mandated tasks. The Board of Education, as an employer, has a strong interest in the fitness of its employees and in developing procedures to readily ascertain the current status of its employees' fitness. Additionally, the Board of Education as a surrogate parent for a large part of the day, has an even greater interest in the safety and well-being of the millions of children placed in it charge each day. Cf. Pordum v. Board of Regents, 491 F. 2d 1281 (2nd Cir., 1974), cert. denied 419 U.S. 843 (1974). This interest, including as it must the safety of Board employees as well as children, is not substantially diminished when the employee, as plaintiff, performs his duties in Board headquarters or other non-pedagogical pursuits.

Against these strong governmental interests, plaintiff can muster only his personal interest in a continued stream of salary payments. Even this interest, as we previously noted, has been found by the New York courts not to be constitutionally protected. See, supra, footnote p. 21.

It is our contention that the procedures accorded plaintiff, on balance, satisfied procedural due process. Plaintiff had the right under the union contract to have a copy of the report of the medical division sent to his physician (69). He was requested to, and did furnish, a report from his own physician and was asked for further material from his own physician. Thus the medical division's opinion as to plaintiff's health was supplemented by the opinion of plaintiff's own physician. Moreover, the consulting psychiatrist would not have been a Board employee. Once a determination had been made by the medical division, plaintiff had the right to be examined by an ad hoc committee of three physicians. In addition, before the Chancellor made any final determination as to his fitness to perform his duties, plaintiff had the right to a hearing before the Chancellor's Committee on Disabled Teachers pursuant to By-Law 105(a) (2). These procedures significantly reduce the risk of error involved before any medical determination becomes final.

Moreover, the type of determination being made here is one of expert opinion and not a conventional fact-finding. A hearing at these early stages, when the medical information and evaluation is itself incomplete would serve no useful purpose. Thus, not only is the issue itself not conducive to adversarial determination but, at this preliminary stage in the proceedings, any formal hearing procedure would be meaningless.

POINT III

ASSUMING, ARGUENDO, THAT PLAINTIFF SHOWED A VIOLATION OF A FEDERALLY PROTECTED RIGHT, THE COMPLAINT SHOULD NEVERTHELESS BE DISMISSED AS AGAINST THE DEFENDANT BOARD OF EDUCATION.

(a) The Board of Education is not a "person" within the meaning of 42 U.S.C. §1983.

In an exhaustive opinion, a unanimous panel of this Court has held that the Board of Education of the City of New York is not a "person" within the meaning of 42 U.S.C. §1983. Monell v. Dept. of Soc. Serv. of City of New York, 532 F. 2d 259 (1976), cert. granted 45 U.S.L.W. 3508. This Court therefore concluded that it had no jurisdiction to award monetary relief against the Board under the Civil Rights Act. See; also Kornit v. Bd. of Ed., Plainview-Old Bethpage, 542 F. 2d 593,594 (2d Cir., 1976).

(b) In Brault v. Town of Milton, 527 F. 2d 730 (1975), a majority of a panel of this Court held that a municipality could be held liable for damages in an action founded directly upon the 14th Amendment if the jurisdictional amount requirement of 28 U.S.C. §1331 was satisfied. Very respectfully, we submit that the courts are without power to imply a cause of action directly from the 14th Amendment. Moreover, assuming even that the courts possess such power, we submit that such power should not be exercised to imply a cause of action directly from the 14th Amendment against the

defendant Board of Education.

This Court, sitting en banc, reversed the decision of the Brault panel majority and dismissed the complaint. The Court did so on the ground that the complaint did not demonstrate any basis for a claim that the plaintiff's 14th Amendment rights had been violated. The en banc majority did not reach the question of substantive liability and municipal immunity under the 14th Amendment. 527 F. 2d at p. 738.*

We submit that the Brault panel majority decision was wrong and the application of its doctrine in the instant case should be rejected.

(1)

Support for the Brault doctrine rests principally on the decision in Bivens v. Six Unkown Federal Narcotics Agents, 403 U.S. 388 (1971). The Brault panel majority found in Bivens "sweeping approbation of constitutionally based causes of action". Very respectfully, we find no such "sweeping approbation" in Bivens as would warrant radical extension of that 6-3 holding of the Supreme Court (Harlan, J., concurring but counselling restraint) of the sort which has been taken

*In an amicus brief submitted for the en banc consideration of Brault, this office fully briefed the issue of municipal liability under a 14th Amendment cause of action. Our treatment of the issue here tracks the discussion in our Brault brief in more summary fashion.

place here. More specifically, Bivens imposed liability on the agents themselves, in a classic tort situation, where the Court's opinion clearly exhibits concern that if plaintiff did not have a remedy in federal court, he would, as a practical matter, be remediless*. Further, Bivens does not, as the Brault majority appears to assume, necessarily sanction an award of money damages as the remedy for any violation of a constitutional right. Rather, it expressly recognizes that "special factors", including the question of who is to pay such damages, and the presence or absence of congressional declarations on the subject, must be considered in determining the appropriateness of this remedy. See 403 U.S. at p. 396-97.

Bivens is clearly distinguishable from the Brault situation in that in the later case we have specific evidence of congressional intent, expressed in Section 1983 and exhaustively documented in Monroe v. Pape, 365 U.S. 167 (1963), that municipalities should not be held liable in federal court for violations

*Thus, it has been argued that Bivens merely filled a statutory void by providing "otherwise unprotected victims of unconstitutional federal action the same remedy that section 1983 provides victims of similar conduct by state and local officials" subject to the same limitations. See, Livingood v. Townsend; 422 F. Supp. 24 (D. Minn., 1976). See, also, Monahgan, "The Supreme Court, 1974 Term-Forward: Constitutional Common Law," 89 Harv. L. Rev, 1, 23-24 (1975); "Note, Damage Remedies Against Municipalities For Constitutional Violations," 89 Harv. L. Rev,922, 932 (1976).

of the 14th Amendment.

(2)

Prior to the panel decision in Brault, this Court had held, in Fischer v. City of New York, 312 F. 2d 890 (2d Cir., 1963), that the plaintiff's claim against the City was barred because a municipality is not liable under §1983. Despite the fact that it was decided prior to Bivens, we submit that for the reasons below, Fischer was correctly decided and should be followed. But see, contra, Skehan v. Board of Trustees of Bloomsburg State College, 501 F. 2d 31 (3rd Cir., 1974), vacated and remanded, 421 U.S. 983 (1975).

Whatever "sweeping approbation" Bivens may give to causes of action founded upon other provisions of the Constitution, we submit that it affords no basis for premising a cause of action upon the 14th Amendment.

The Court in Bivens recognized that the Fourth Amendment does not provide for its enforcement and proceeded to imply a remedy in damages where Congress had not taken affirmative action (p. 396). The Fourteenth Amendment, on the contrary, provides quite clearly, in Section 5, that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." We submit that the power of enforcement conferred upon Congress by Section 5 is plenary and complete and has been exercised by it

in the various civil rights laws. We further submit that the 14th Amendment vests no residual power in the judicial branch to create a cause of action not authorized by Congress to vindicate rights granted by that amendment.

When Senator Howard introduced the proposed 14th Amendment of the Constitution in the Senate on May 23, 1866, he said concerning Section 5:

> "It gives to Congress power to enforce by appropriate legislation all the provisions of this article of amendment. Without this clause, no power is granted to Congress by the amendment or anyone of its sections. It casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no state infringes the rights of persons or property. I look upon this clause as indispensable for the reason that it imposed upon Congress this power and duty." Cong. Globe, 39th Cong., 1st Sess., 2768.

Only thirteen years after the ratification of the 14th Amendment, the Supreme Court commented upon Section 5 in Ex Parte Virginia, 100 U.S. 313 (1879), a case challenging the Civil Rights Act of March 1, 1875. There the Court stated (at p. 346):

> "All of the Amendments derive much of their force from this latter provision [Section 5]. It is not said the judicial power of the General Government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged."

This same position was reiterated by Justice Harlan in his dissent in the Civil Rights Cases, 109 U.S. 3, 45-46 (1883), and reaffirmed by Justice Brennan in Katzenbach v. Morgan , 384 U.S. 641 (1966). In the latter case it is stated (at p. 651):

> "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guaranties of the Fourteenth Amendment."

We do not suggest that the 14th Amendment would be a nullity without congressional action pursuant to Section 5. Obviously, the 14th Amendment, like any other provision of the Constitution, can be raised defensively in an appropriate forum. However, a cause of action to affirmatively vindicate 14th Amendment rights must be created by Congress, which is alone empowered to enforce the 14th Amendment.* Indeed, Congress appears to have accepted this interpretation of its role under the 14th Amendment by its enactment of the predecessor statute of 42 U.S.C. §1983 and 28 U.S.C. §1343, the Act of April 20, 1871.

The Congress which enacted the Act of April 20, 1871, had adopted the 14th Amendment less than three years before. It can be presumed that Congress

*The 4th Amendment which was at issue in Bivens, unlike the 14th Amendment, at issue here, does not purport to confer enforcement power upon any branch of the government. It is, therefore, more susceptible to being interpreted as it was in Bivens, as conferring the power to enforce it jointly upon the legislative and judicial branches.

had a clear view of its power under the Amendment. The Act of April 20, 1871 created a substantive cause of action to enforce the 14th Amendment (now 42 U.S.C. §1983) and gave jurisdiction over this cause of action to the federal courts (now 28 U.S.C. §1343(3)). Obviously, if the Congress believed that the 14th Amendment conferred upon the federal judiciary some residual power to enforce it through the creation of causes of action, it would not have created the substantive cause of action. If the analysis of the panel majority in Brault of its power to affirmatively enforce the amendment is correct, then Congress was wasting its time in creating a cause of action in the Act of April 20, 1871. All that was required was a jurisdictional provision.

We submit that the 14th Amendment clearly contemplates its enforcement by the Congress; that the Congress has enforced it; and that the Courts are without power to create an additional remedy.

(3)

Assuming, but not conceding, that the federal courts retain some power to fashion affirmative remedies based upon the 14th Amendment, we submit that the Court erred in the instant case in creating a cause of action for damages applicable to the Board. As noted above, Congress created by the Act of April 20, 1871, a cause of action to enforce the 14th Amendment and conferred upon the federal courts jurisdiction to entertain

actions to enforce such cause of action. This cause of action, however, has been repeatedly held by the Supreme Court not to apply to municipalities. We submit that the Court in the instant case should have deferred to the clear congressional intent to exclude municipalities from liability for violations of the 14th Amendment.

The "sweeping approbation" of constitutionally based causes of action that the Brault panel found in the Bivens decision, had been clearly qualified by the Bivens Court:

"The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." The Supreme Court then went on to indicate what it meant by "special factors" counselling hesitation:

> "Finally, we cannot accept respondents' formulation of the question as to whether tha availability of money damages is necessary to enforce the Fourth Amendment. For we have here no explicit declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in the view of Congress." Bivens, supra at p. 397 (emphasis added).

In the case at bar there is present the precise special factor counselling hesitation of which the Supreme Court warned in Bivens. The Supreme Court has made crystal clear Congress' intent to exclude municipalities from liability for violations of §1983, which

creates an explicit statutory cause of action for violations of the 14th Amendment. Nevertheless, the panel majority in Brault apparently concluded that this clear congressional intent did not counsel any hesitation in imposing liability upon municipalities for violations of constitutional rights.

In reaching its decision the panel majority implied that the congressional intention to exempt municipalities from liability under the Act of April 20, 1871, was somehow vitiated by the passage of the Act of March 3, 1875. This statute (now, as subsequently amended, 28 U.S.C. §1331 (a)) gave to the federal courts original jurisdiction in civil actions wherein the matter in controversy was of a sum or value exceeding $500 (now $10,000) and arose under the Constitution, laws or treaties of the United States. The panel majority reasoned that in passing the Act of March 3, 1875, Congress decided that the municipal exemption from liability granted by the Act of April 20, 1871 was to be limited to cases in which the matter in controversy had a value less than the $500 jurisdictional amount required by the Act of March 3, 1875. In other words, the Act of March 3, 1875, empowered the federal courts to entertain a case which was based directly on the 14th Amendment if the plaintiff's claim against the municipal defendant had a value in excess of the $500 jurisdictional amount. If, however, the claim

was valued at less than $500, the plaintiff's only entry to the federal courts was pursuant to the Act of April 20, 1871 (now 42 U.S.C. §1983) which, while affording entry to the federal courts, unfortunately precluded recovery by virtue of its grant to municipalities of an exemption from liability. We submit that this peculiar jurisdictional scheme suggested by the panel's decision as a means of harmonizing its construction of 28 U.S.C. §1331 with Congress' intention to exclude municipalities from liability under 42 U.S.C. §1983 has no basis in the history of 28 U.S.C. §1331, and in fact makes no sense at all. It preserves the hard fought for municipal immunity from damages where the exposure to liability is trivial (less than $10,000; originally $500), but wipes out such immunity where the exposure is - to an unlimited extent - greater.

In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Supreme Court held that the plaintiffs, who were prisoners seeking restoration of good-time, could not commence an action under 42 U.S.C. §1983 in order to avoid the requirement of habeas corpus that state court remedies must be exhausted before a federal action can be commenced. The Court stated at pages 489-490:

> "It would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label

on their pleadings. In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of §1983."

In creating a remedy for violation of the Fourteenth Amendment the Congress clearly intended to immunize municipalities from liability. If this court is free to imply a cause of action from the Fourteenth Amendment pursuant to an historically silent congressional grant of jurisdiction, we submit that it should not exercise this power to frustrate the clear congressional intention to immunize municipalities from liability.*

(4)

We would also note a recent decision of the Supreme Court that may be indicative of its attitude toward the question under discussion. In Paul v. Davis, 424 U.S. 693 (1976), the Court considered the issue

*Illustrative of the approach which we believe is here called for is the Supreme Court's decision in Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975), in which the Court declined to allow the award of counsel fees in federal courts in the absence of statutory authorization. First, Alyeska seems clearly to indicate that, to the extent that this court may have the power to adopt a particular rule, that raw, naked power of the judiciary does not answer the question of whether the rule should be adopted. It is not enough that the judiciary prefer a rule; other elements besides judicial power and preference must be considered if judicial power is properly to be exercised. Second, and related to the first point, Alyeska indicates the deference which the courts should pay to congressional actions - whether, as there, the action be largely inaction to change existing law, or, as here, longstanding and continuing congressional action in the civil rights field indicating that body's unwillingness to extend Section 1983 liability to municipalities.

whether petitioner's defamation by a police officer constituted a basis for relief under 42 U.S.C. §1983 and the 14th Amendment. The Court stated (424 U.S. at p. 701):

> "[Petitioner] apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-102 (1971); a fortiori the procedural guarantees of the Due Process Clause cannot be the source for such law."

Yet a "font" of federal tort law is precisely what this Court would create if it revived the Brault doctrine. The 14th Amendment, unlike the 4th Amendment, casts a wide net. Virtually every tort, contract, condemnation and zoning case in which a municipality is involved can be framed in terms of a violation of the 14th Amendment and, under the Brault doctrine, it would appear that, as long as $10,000 in damages are alleged, entry into a federal forum is assured. The result in New York would be that the federal courts attain concurrent jurisdiction with the New York State Supreme Court in virtually every case in which the City is a defendant, inviting unprecedented opportunities for forum shopping by plaintiffs, and creating

uncertainty as to the availability of the defenses against and the restrictions upon municipal liability that the states have created to protect their cities and towns.*

Only recently, the Supreme Court has been at pains to reaffirm the continued vitality of the principle of federalism - even to the extent of invalidating congressional legislation. See National League of Cities v. Usery, 426 U.S. 833 (1976). And, we believe, it is that same principle, even if not expressly referred to, which has guided and animated the Court in its decisions in Paul v. Davis, supra, and Bishop v. Wood, 426 U.S. 341 (1976), in both of which cases the Court clearly suggested that the 14th Amendment was an inappropriate vehicle for attempting to right all alleged wrongs committed by local governmental officials. Under our Federal system the state legislatures and judiciary have provided remedies in addition to the rights and remedies which Congress has seen fit to provide in the federal civil rights laws. Surely, a decent respect for both the role of Congress

*Another factor counselling hesitation in the application of the Brault doctrine arises from the fact that the 14th Amendment is directed toward state action. Ironically, if the Board were in fact a state it would be immunized from liability via the 11th Amendment. The incongruity of holding a municipality a state for 14th Amendment purposes but not for the purpose of claiming immunity under the 11th Amendment was apparently brought home to Congress when it enacted Section 1983. See discussion of legislative debate, Monroe v. Pape, 365 U.S. 167, 190-91 (1960). See, also, City of Kenosha v. Bruno, 412 U.S. 507 (1973).

in legislating and the role of the states in our federal system counsels most strongly against judicial creation of new rights and remedies under the 14th Amendment, and this seems most clearly to be the view of the Supreme Court.

In sum, the existance of these "special factors", specifically considerations of federalism, the role of federal courts in fashioning constitutional remedies in the absence of congressional action, and the reluctance of the Supreme Court to extend liability to municipalites for alleged violations of their officers, counsels against the establishment of a direct 14th Amendment action against the Board.*

*This position has the support of several recent district court opinions. See, Raffety v. Prince George's Cty.,423 F. Supp. 1045, 1057 (D. Md., 1976); Livingood v. Townsend, 422 F. Supp. 24,27 (D. Minn., 1976); Farnsworth v. Orem City, 421 F. Supp. 830, 831 (D. Utah 1976). But see, Matherson v. Long Island State Park Commission, 442, F. 2d 566 (2nd Cir., 1971).

POINT IV

IT WAS ERROR FOR THE DISTRICT COURT TO GRANT SUMMARY JUDGMENT FINDING THE DEFENDANT ARRICALE PERSONALLY LIABLE FOR AN AWARD OF MONEY DAMAGES.

The defendant Arricale possessed a qualified, good-faith immunity from liability for damages under § 1983. Wood v. Strickland, 420 U.S. 308 (1975). A compensatory damages award would be appropriate against him only if it were shown that he "acted with such an impermissable motivation or with such disregard of ... clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." Id., at p. 322.

Defendants pleaded in their answer that they had acted in good faith toward plaintiff. Plaintiff made only a conclusory allegation that the defendants had conspired to conceal the true purpose of the medical examination from him. The District Court found that the documentary evidence precluded an assertion of such a conspiracy and characterized the procedural deprivation that it found as having occurred unintentionally.

On this state of the record, an award of summary judgment against Arricale was impermissable. Arricale's only contact with plaintiff was the fact that he signed, in his capacity as chief of the Personnel Division, the two letters that placed Grant on medical

leave of absence. There is no allegation that Arricale had any contact with plaintiff prior to December 22, 1974, well after the first medical examination had been concluded. As far as this record reveals, plaintiff was not singled out for discriminatory treatment by Board personnel, but was treated according to long-standing procedures that had received the acceptance of the teacher's union and had been incorporated into the collective bargaining agreement.

The area of constitutional law dealing with rights of government emplcyees remains troublesome, even after the recent decisions of the Supreme Court cited in this brief. This clearly is not a case where it can be said that the rights of the employee were clearly and authoritatively defined at the time of the municipal employer's action. To hold Arricale liable here would be tantamount to charging him with knowledge of constitutional requirements that have yet to be authoritatively articulated.

CONCLUSION

The order and final judgment of the District Court should be reversed and an order entered directing the District Court to enter summary judgment dismissing the complaint against all defendants, with costs.

July 20, 1977

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of
the City of New York,
Attorney for Appellants.

L. KEVIN SHERIDAN,
FRANCIS F. CAPUTO,
of Counsel.*

*Robert Abidor, a third-year law student at Rutgers-Newark Law School substantially contributed to the preparation of this brief.

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AFFIDAVIT OF SERVICE ON ~~[illegible]~~ OF PRINTED PAPERS

City, County and State of New York, ss.:

Allenton James

being duly sworn, says, that on the 21 day of July, 1977 at No. 250 W. ~~[illegible]~~ 77th St. in the Borough of MANH. in The City of New York, he served three copies of the annexed APPLTS - BRIEF upon ROBT S. GRANT ~~[illegible]~~ ~~[illegible]~~ the PLTFF APPLEE PRO-SE in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 21 day of July, 1977

Allenton James

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4-1786
Commission Expires May 1, 1978

Bruce Garner